ORIGINAL

Supreme Court, U.S.
FILED
JUL 12 2010
OFFICE OF THE CLERK

NO. 09-1520

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

REGINAL KEITH HAGEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), respondent Reginal Keith Hagen asks leave to file the accompanying Brief in Opposition without prepayment of costs and to proceed in forma pauperis. Respondent was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), both in the United States District Court and on appeal to the United States Court of Appeals for the Fifth Circuit.

Date:
July 12, 2010

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

TIMOTHY C. CROOKS
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana, Suite 1350
Houston, Texas 77002-1634
Telephone: (713) 718-4600

RECEIVED
JUL 14 2010
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 09-1520

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

REGINALD KEITH HAGEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

TIMOTHY CROCKS
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana, Suite 1350
Houston, Texas 77002-1634
Telephone: (713) 718-4600

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit correctly determined that respondent's Texas conviction for misdemeanor assault by intentionally and knowingly causing bodily injury to a family member did not qualify as a conviction for a "misdemeanor crime of domestic violence," under 18 U.S.C. 922(g)(9), because it did not have "as an element, the use or attempted use of physical force," as required under 18 U.S.C. § 921(a)(33)(A)(ii).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

REASONS FOR DENYING THE WRIT 1

The government's petition for a writ of certiorari should be denied in this case because the Fifth Circuit's conclusion is a correct interpretation of the law, and because review of any perceived conflict in the circuits is not appropriate at this time. 1

A. Introduction. 1

B. Any Conflict Among the Circuits Precedes this Court's Clarification in Leocal and Johnson That the Use of Physical Force Is the Use of Active, Violent Force, Not the Causation of Injury. Therefore, this Court's Intervention Would be Premature. 3

C. The Fifth Circuit Correctly Held That the Element of Causing Bodily Injury Does Not Require Proof of Use of Force. 7

1. The Use of Physical Force Must be the Use of Active, Violent Force. 8

2. The Court Must Look to the Statutory Elements of the Offense Not the Underlying Conduct. 9

3. The Statute Applies to Offenses That Have As An Element the Use of Physical Force, Not to Offenses That Focus on Causing Injury. 14

CONCLUSION 17

TABLE OF CITATIONS

Page

CASES

Bailey v. United States, 516 U.S. 137 (1995) 8

Carachuri-Rosendo v. Holder, ____ S. Ct. ____,
2010 WL 2346552 (U.S. June 14, 2010) 11

Chrzanoski v. Ashcroft, 327 F.3d 188
(2d Cir. 2003) 3, 10

Flores v. Ashcroft, 350 F.3d 666
(7th Cir. 2003) 8, 10

Gonzales v. Duenas-Alvarez,
549 U.S. 183 (2007) 13

Griffin v. Oceanic Contractors, Inc.,
458 U.S. 564 (1982) 14

Johnson v. United States,
130 S. Ct. 1265 (2010) . . . . . ii, 2-3, 5-9, 16

Leocal v. Ashcroft, 543 U.S. 1 (2004) . . . ii, 3-5, 7-8, 10, 13

Nijhawan v. Holder, 129 S. Ct. 2294 (2009) 10-11

Shepard v. United States, 544 U.S. 13 (2005) 10

Singh v. Ashcroft, 386 F.3d 1228
(9th Cir. 2004) 12

Taylor v. United States, 495 U.S. 575 (1990) 9-10

United States v. Alexander, 543 F.3d 819
(6th Cir. 2008) 6

United States v. Belless, 338 F.3d 1063
(9th Cir. 2003) 6

United States v. Bonilla-Mungia, 422 F.3d 316
(5th Cir. 2005) 9

United States v. Calderon-Peña, 383 F.3d 254
(5th Cir. 2004) (en banc) 10, 12

United States v. Fulford, 267 F.3d 1241
(11th Cir. 2001) 12

TABLE OF CITATIONS - (Cont'd)

Page

CASES - (Cont'd)

United States v. Griffith, 455 F.3d 1339
(11th Cir. 2006) 6

United States v. Hagen, No. 07-20798, 2009 WL 3294785
(5th Cir. Oct. 14, 2009) (unpublished) 2-3, 6

United States v. Hayes, 129 S. Ct. 1079 (2009) 1, 11

United States v. Jones, 235 F.3d 342
(7th Cir. 2000) 12

United States v. King, No. H-06-0363, 2007 WL 7144780
(S.D. Tex. July 10, 2007) (unpublished) 2

United States v. Landeros-Gonzales, 262 F.3d 424
(5th Cir. 2001) 9

United States v. Morrison, 529 U.S. 598 (2000) 15

United States v. Nason, 269 F.3d 10
(1st Cir. 2001) 3-5

United States v. Perez-Vargas, 414 F.3d 1282
(10th Cir. 2005) 6

United States v. Sampson, 606 F.3d 505
(8th Cir. 2010) 6

United States v. Smith, 171 F.3d 617
(8th Cir. 1999) 3-5

United States v. Vargas-Duran, 356 F.3d 598
(5th Cir. 2003) (en banc) 3, 9, 10

United States v. Villegas-Hernandez, 468 F.3d 874
(5th Cir. 2006) 2-3, 7-10

United States v. White, 606 F.3d 144
(4th Cir. 2010) 5-6

TABLE OF CITATIONS - (Cont'd)

Page

STATUTES

8 U.S.C. § 1101(a)(43)(G) 13

8 U.S.C. § 1326(b) 11

18 U.S.C. § 16 4

18 U.S.C. § 16(a) 4, 7

18 U.S.C. § 16(b) 4-5

18 U.S.C. § 921(a)(33)(A)(ii) . . . . . i, 1, 5-6, 8, 14, 16

18 U.S.C. § 922(g)(1) 9

18 U.S.C. § 922(g)(9) . . . . . i, 1, 7, 9, 11, 15

18 U.S.C. § 924(a)(1)(A) 1

18 U.S.C. § 924(a)(2) 1

18 U.S.C. § 924(e)(2)(B)(i) 2, 5

18 U.S.C. § 924(e)(2)(B)(ii) 9, 14

Tex. Penal Code § 22.01(a)(1) 2

SENTENCING GUIDELINES

USSG § 2L1.2(b)(1)(A)(ii) 6

USSG § 4B1.2(a) 6

USSG § 4B1.2(a)(2) 6

MISCELLANEOUS

Black's Law Dictionary 538 (7th ed. 1999) 10

Black's Law Dictionary 717 (9th ed. 2009) 2, 8

TABLE OF CITATIONS - (Cont'd)

Page

MISCELLANEOUS - (Cont'd)

Brief in Opposition,
Marley v. United States, No. 09-270,
2009 WL 3614462 (Nov. 2, 2009) 7

Brief in Opposition,
McCloud v. United States, No. 09-1177,
2010 WL 2214825 (June 1, 2010) 7

Office of Legal Counsel, United States Department of Justice,
When a Prior Conviction Qualifies As a "Misdemeanor Crime
of Violence" (May 17, 2007), available at
2007 WL 3125588 (hereinafter "OLC Memo") 11-12

REASONS FOR DENYING THE WRIT

The government's petition for a writ of certiorari should be denied in this case because the Fifth Circuit's conclusion is a correct interpretation of the law, and because review of any perceived conflict in the circuits is not appropriate at this time.

A. Introduction.

It is a crime for any person "who has been convicted in any court of a misdemeanor crime of violence," to "possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(9). The term "misdemeanor crime of violence" means a misdemeanor offense that "has, as an element, the use or attempted use of physical force, or threatened use of a deadly weapon" against a victim with whom the defendant has a domestic relationship. 18 U.S.C. § 921(a)(33)(A)(ii). The statute requires that the use, attempted use or threatened use of force be an element of the predicate offense. United States v. Hayes, 129 S. Ct. 1079, 1084 (2009).

On May 31, 2007, Mr. Hagen was charged in a four-count indictment with two counts of possession of a firearm by a person convicted of a misdemeanor crime of violence, in violation of 18 U.S.C. §§ 922(g)(9) and 924(a)(2), and two counts of making false statements concerning whether he had been convicted of such an offense, in violation of 18 U.S.C. § 924(a)(1)(A). R. 8-11.[1] The charges against Mr. Hagen were predicated on his 2005

[1] References to the record on appeal will be made by the "USCA" page number, or numbers, of the consecutively paginated electronic record, in the following manner: "R.__."

conviction in Harris County, Texas for misdemeanor assault. The Texas statute under which Mr. Hagen was convicted provides: "A person commits an offense if the person . . . intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse." See Tex. Penal Code § 22.01(a)(1).

On September 27, 2007, the district court granted Mr. Hagen's motion to dismiss the indictment. R. 78-80; R. 82; see Pet. App. B. Relying on United States v. Villegas-Hernandez, 468 F.3d 874 (5th Cir. 2006), and United States v. King, No. H-06-0363, 2007 WL 7144780 (S.D. Tex. July 10, 2007) (unpublished)) (Pet. App. C), the district court concluded that Mr. Hagen's prior assault was not a "crime of violence." Pet. App. B.

The Fifth Circuit denied the government's petition for initial en banc review, Pet. App. D, and, agreeing with the district court, affirmed the dismissal. United States v. Hagen, No. 07-20798, slip op. at 2, 2009 WL 3294785 (5th Cir. Oct. 14, 2009) (Pet. App. A). On March 2, 2010, this Court held in Johnson v. United States, 130 S. Ct. 1265 (2010), that the term "use of physical force" as used in defining a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(i) requires an act of "power, violence, or pressure directed against a person or thing." 130 S. Ct. at 1270 (quoting Black's Law Dictionary 717 (9th ed. 2009)). The following day, the Fifth Circuit denied the government's petition to reconsider Mr. Hagen's case. Pet. App. E.

In its petition for certiorari, the government contends that the Fifth Circuit's decision is in conflict with other circuits,

that the Fifth Circuit has misinterpreted the term "use of physical force," and that the decision threatens to impede effective law enforcement. In fact, there is no real circuit conflict, the Fifth Circuit's interpretation of the plainly-worded statute follows this Court's precedent, and the government's law enforcement arguments conflict with its own previous legal memoranda on this issue. In any event, if the government is now dissatisfied with the scope of the statute, it should direct that dissatisfaction to Congress, not to this Court.

B. Any Conflict Among the Circuits Precedes this Court's Clarification in *Leocal* and *Johnson* That the Use of Physical Force Is the Use of Active, Violent Force, Not the Causation of Injury. Therefore, this Court's Intervention Would Be Premature.

In Mr. Hagen's case, the Fifth Circuit relied on its precedent distinguishing between the causation of bodily injury and the use of physical force. Hagen, No. 07-20798, slip op. at 2 (citing United States v. Villegas-Hernandez, 468 F.3d 874 (5th Cir. 2006)). In Villegas-Hernandez, the Fifth Circuit held that a conviction for assault under the Texas statute was not a crime of violence because the "intentional causation of injury does not necessarily involve the use of force." 468 F.3d at 881 (quoting Chrzanoski v. Ashcroft, 327 F.3d 188, 195 (2d Cir. 2003), and citing United States v. Vargas-Duran, 356 F.3d 598, 606 (5th Cir. 2003) (en banc)).

The government contends that the Fifth Circuit's decision in this case is in conflict with the First Circuit's decision in United States v. Nason, 269 F.3d 10, 22 (1st Cir. 2001), and the Eighth

Circuit's decision in United States v. Smith, 171 F.3d 617, 621 (8th Cir. 1999). Pet. 8, 14-15. In Smith, the Eighth Circuit summarily concluded that "an act intended to cause pain, injury, or offensive or insulting physical contact" was an offense with an element of physical force. 171 F.3d at 621. The First Circuit recognized that the federal statute "focuses on the assailant's conduct," while the Maine statute at issue focused "on the victim's circumstances (i.e. whether the victim endured either bodily injury or an offensive physical contact)." Nason, 269 F.3d at 19-20. Assuming that physical force must necessarily be used to cause physical injury, the First Circuit held that the Maine statute proscribed a crime of violence as defined under the federal statute. 269 F.3d at 18-21.

Subsequent to the decisions in Smith and Nason, this Court endorsed the distinction between the use of force and the causation of injury. See Leocal v. Ashcroft, 543 U.S. 1, 10-11 & n.7 (2004). In Leocal, the Court addressed the question whether a conviction for driving under the influence ("DUI") with serious bodily injury was a crime of violence under 18 U.S.C. § 16, which defines a crime of violence as an offense that 1) has as an element the use, attempted use or threatened use of physical force, or 2) the substantial risk that such force will be used. 18 U.S.C. § 16(a) & (b). This Court explained that the element of substantial risk in § 16(b) "relates **not** to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing the crime." Leocal, 543 U.S. at 10 (emphasis in original). The statute

"plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct. The 'substantial risk' in § 16(b) relates to the use of force, not the possible effect of a person's conduct." 543 U.S. at 10 n.7. Thus, in Leocal, this Court rejected the First and Eighth Circuits' assumptions underlying their decisions in Nason and Smith that causation of bodily injury necessarily entails the use of physical force. Id.

Just last term, this Court addressed the meaning of the "use of physical force" requirement in the definition of a "violent felony" under the Armed Career Criminal Act. See Johnson v. United States, 130 S. Ct. 1265 (2010) (interpreting 18 U.S.C. § 924(e)(2)(B)(i)). The Court held that the "use of physical force" necessarily entails the exertion of "power, violence, or pressure." 130 S. Ct. at 1270.

The Fourth Circuit is the only circuit other than the Fifth to have addressed the § 921(a)(33)(A)(ii) definition of "crime of violence" since Johnson, and it too concluded that the phrase "physical force" means "**violent** force." See United States v. White, 606 F.3d 144, 151-53 (4th Cir. 2010) emphasis in original). In doing so, the Fourth Circuit noted that Johnson had resolved any potential conflict with the First Circuit decision in Nason and the Eighth Circuit decision in Smith. See White, 606 F.3d at 152-53.[2]

---

[2] The Fourth Circuit also mentioned that Johnson had effectively overruled the Eleventh Circuit's decision in United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006), which involved (continued...)

In other words, both the Fifth Circuit's decision in Hagen and the Fourth Circuit's decision in White are in accord. See also United States v. Belless, 338 F.3d 1063, 1067-69 (9th Cir. 2003).

Moreover, the Eighth Circuit has already given indications that its case law on the subject may be ripe for reconsideration in light of Johnson. In United States v. Sampson, 606 F.3d 505, 511 (8th Cir. 2010), the Eighth Circuit acknowledged that Johnson had clarified that a statute that focuses on the risk of injury is not categorically a crime of violence under a provision that requires as an element the use of physical force. Sampson, 606 F.3d at 511.[3]

Thus, the courts have not disagreed on the application of 18 U.S.C. § 921(a)(33)(A)(ii) following this Court's determination that a crime of violence definition requiring the use of physical force requires the active use of violent, physical force, see Johnson, 130 S. Ct. at 1270, rather than the causation of injury. See Leocal, 543 U.S. at 10-11 & n.7. Far from presenting a circuit

---

[2] (...continued)
the same battery statute deemed not to be a crime of violence in Johnson. White, 606 F.3d at 152.

[3] Citing United States v. Alexander, 543 F.3d 819, 823 (6th Cir. 2008) (assault is a crime of violence under USSG § 4B1.2(a)), and United States v. Perez-Vargas, 414 F.3d 1282, 1285-87 (10th Cir. 2005) (assault is not a crime of violence under USSG § 2L1.2(b)(1)(A)(ii)), the government also contends that the circuits have reached conflicting results under the Sentencing Guidelines in reference to use of force provisions. Pet. 15 n.6. In fact, the assault at issue in Alexander could have been considered a crime of violence under USSG § 4B1.2(a)(2), which focuses on the risk of injury. Alexander, 543 F.3d at 823. Here again, the government fails to perceive the difference between predicates that focus on the defendant's use of force and those that focus on the potential harm to others.

split, the government is actually arguing that the Fifth and Fourth circuits have misinterpreted Johnson. See Pet. 12 n.4.

In sum, the only two circuits to have addressed the implications of Johnson for prosecutions under 18 U.S.C. § 922(g)(9) are in agreement and the other circuits have not yet had the opportunity to address the issue. Therefore, there is no reason for this Court to intervene, and a grant of certiorari in Mr. Hagen's case would be premature. Cf. Brief in Opposition, McCloud v. United States, No. 09-1177, 2010 WL 2214825, at *10-*11 (June 1, 2010); Brief in Opposition, Marley v. United States, No. 09-270, 2009 WL 3614462, at *10 (Nov. 2, 2009) ("With the exception of the Third Circuit's decision . . ., those cases were decided before [*this Court's decision*] which substantially clarified the issue [concerning equitable tolling] . . . At least until other courts have had the opportunity to consider the issue in light of [this Court's decision], this Court's review would be premature.").

C. The Fifth Circuit Correctly Held That the Element of Causing Bodily Injury Does Not Require Proof of Use of Force.

1. The Use of Physical Force Must Be the Use of Active, Violent Force.

In Villegas-Hernandez, the Fifth Circuit held that the Texas offense of assault, defined as intentionally, knowingly or recklessly causing bodily injury, was not a crime of violence under 18 U.S.C. § 16(a), because it did not include as an element the use or attempted use of "physical force." 468 F.3d at 883. Relying on Villegas-Hernandez, the lower courts held that Mr. Hagen's assault

conviction could not be considered a domestic crime of violence under 18 U.S.C. § 921(a)(33)(A)(ii), which likewise requires as an element the use or attempted use of physical force. Pet. Apps. A & B.

In Leocal, this Court held that the use of physical force means the "active employment" of force, 543 U.S. at 9 (citing Bailey v. United States, 516 U.S. 137, 143 (1995)). In the context of a "crime of violence," the term means "violent, active crimes." Id. at 11. The focus is on the defendant's conduct, not the harm to the victim. Id. at 10-11 & n.7. Contrary to the government's suggestion, Leocal did not hold that "physical force is the means by which injury is necessarily produced." Pet. 8. In fact, the Court held the opposite: that a defendant could cause injury without the active employment of physical force. Leocal, 543 U.S. at 10-11 & n.7 (holding that DUI with serious bodily injury was not a crime of violence).

In Johnson, this Court reiterated that the "use of physical force" necessarily entails "active power." 130 S. Ct. at 1270. Such "force" is "power, violence, or pressure directed against a person or thing." Id. (citing Black's Law Dictionary 717 (9th ed. 2009)). Emphasizing that it was defining a "violent" offense, the Court thought it clear that "the phrase 'physical force' means ***violent*** force – that is, force capable of causing physical pain or injury to another person." Id. at 1271 (emphasis in original) (citing Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003)

(Easterbrook, J.)).[4] Similarly, the Fifth Circuit has held that the "use of force" in a statutory definition of a "crime of violence," is "synonymous with destructive or violent force." Villegas-Hernandez, 468 F.3d at 879 (quoting United States v. Landeros-Gonzales, 262 F.3d 424, 426 (5th Cir. 2001)).[5]

2. The Court Must Look to the Statutory Elements of the Offense Not the Underlying Conduct.

In determining the elements of a predicate offense, the Fifth Circuit focuses on the statutory definition, not the defendant's underlying conduct. Villegas-Hernandez, 468 F.3d at 878 (citing Taylor v. United States, 495 U.S. 575, 602 (1990), and United States v. Bonilla-Munguia, 422 F.3d 316, 320 (5th Cir. 2005)). As the Fifth Circuit has explained:

> [A]n element is "[a] constituent part of a claim that must be proved for the claim to succeed." . . . If any set of facts would support a conviction without proof of that component, then the component most decidedly is not an element - implicit or explicit - of the crime.

---

[4] While the Court also remarked that there was "no reason to define 'violent felony' by reference to a nonviolent misdemeanor," 130 S. Ct. at 1272, the Court's emphasis in Johnson was on the use of the term "violent." Id. at 1271-72.

[5] The government's suggestion that the Fifth Circuit's use-of-force test would exclude offenses such as murder from the prohibition on possessing firearms, Pet. 10, is disingenuous. Section 922(g)(9) proscribes possession of a firearm by a person convicted of a *misdemeanor* crime of domestic violence. A person convicted of a felony offense, such as murder, is also precluded from possessing a firearm. 18 U.S.C. § 922(g)(1). Further, the Armed Career Criminal Act enhancements apply to felony convictions that present a "serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

Vargas-Duran, 356 F.3d at 605 (citing Black's Law Dictionary 538 (7th ed. 1999)); accord Villegas-Hernandez, 468 F.3d at 879.

In Villegas-Hernandez, the Fifth Circuit held that a Texas conviction for assault based on causing bodily injury is not per se a crime of violence because a defendant can cause such injury without the use of physical force, for example, by offering the victim a poisoned drink or telling the victim to walk backward out into oncoming traffic. 468 F.3d at 879. Similarly in Trzcinski, the Second Circuit recognized that "human experience suggests numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital medicine." 327 F.3d at 195. Thus, an assault based on causing bodily injury is not necessarily a crime of violence. Villegas-Hernandez, 468 F.3d at 883.

The government emphasizes that the indictment in Mr. Hagen's case alleged that he had hit the complainant. But, as under the modified categorical approach, a court may look to certain conclusive court documents, including the indictment, to determine the offense of conviction. See Shepard v. United States, 544 U.S. 13, 21 (2005); Taylor, 495 U.S. at 602. It cannot, however, look to the facts underlying the defendant's crime to determine the elements and nature of the offense of conviction. Leocal, 543 U.S. at 7; see also United States v. Calderon-Pena, 383 F.3d 254, 257 (5th Cir. 2004) (en banc); Flores, 350 F.3d at 670.

This Court's decision in Nijhawan v. Holder, 129 S. Ct. 2294 (2009), is not to the contrary. In the context of an administrative

immigration proceeding in Nijhawan, the Court considered the underlying facts as to the amount of loss to determine that a fraud conviction was an aggravated felony only because the definition referred to "conduct involved," rather than an element of the offense. 129 S. Ct. at 2302.[6] There was no dispute, however, that Nijhawan had been convicted of fraud. See Carachuri-Rosendo v. Holder, ____ S. Ct. ____, 2010 WL 2346552, at *8 n.11 (U.S. June 14, 2010). Indeed, while interpreting the statute at issue in this case in Hayes, this Court distinguished between the requirement of proof that the defendant had been convicted of a predicate offense that "had as an element the use or attempted use of physical force," and the specific circumstance of the relationship between the defendant and the victim. 129 S. Ct. at 1084.

Despite the government's criticism of the Fifth Circuit's "has as an element" test, and particularly the "any set of facts" formulation, that test, and that formulation, are firmly grounded in bedrock principles of law, as, indeed, the United States Department of Justice has elsewhere recognized in the very context presented here. See Office of Legal Counsel, United States Department of Justice, When a Prior Conviction Qualifies As a "Misdemeanor Crime of Violence" (May 17, 2007), 2007 WL 3125588 (hereinafter "OLC Memo"). As the OLC Memo recognized, "the prohibition [in § 922(g)(9)] turns on the ***legal definition*** of the

---

[6] The government conceded that it would have to prove the loss to a jury beyond a reasonable doubt if it were seeking an aggravated felony enhancement under the criminal statute, 8 U.S.C. § 1326(b). See Nijhawan, 129 S. Ct. at 2302.

predicate offense of conviction, not on the ***actual conduct*** that may have led to the conviction for the offense. One must determine what the convicting court found, not what the defendant did." OLC Memo, at 2 (emphasis in original).

Even more significantly, immediately after this language, the OLC Memo acknowledged that this Court's interpretation of the "has as an element" rubric derived from a proper interpretation of the term "element":

> This conclusion follows from a proper understanding of the key statutory term "element." Elements are the factual predicates of an offense that are specified by law and must be proved to secure a conviction. . . . If conviction of a given offense can be secured without proof of a certain fact, that fact is not an element of that offense. ***As the en banc Fifth Circuit has explained: "If any set of facts would support a conviction without proof of that component, then the component most decidedly is not an element - implicit or explicit - of that crime." United States v. Vargas-Duran, 356 F.3d 598, 605 (5th Cir. 2004);*** see also Singh v. Ashcroft, 386 F.3d 1228, 1231 (9th Cir. 2004) ("An element of a crime is a constituent part of the offense which must be proved by the prosecution in every case to sustain a conviction under a given statute.") (internal quotation marks [and internal emphasis] omitted); United States v. Fulford, 267 F.3d 1241, 1250 (11th Cir. 2001) ("At common law, the word 'element' refers to a constituent part[ ] of a crime which must be proved by the prosecution to sustain a conviction.") (internal quotation marks omitted); United States v. Jones, 235 F.3d 342, 347 (7th Cir. 2000) (holding that an assault and battery conviction did not qualify as a "crime of violence" under the Sentencing Guidelines because "actual, attempted, or threatened physical force is not a necessary element of the offense").

OLC Memo, at 3 (emphasis added) (some citations omitted). And the OLC Memo also endorses the limited "paring down" approach to the "has as an element" question that the Fifth Circuit adopted, sitting en banc, in Calderon-Peña. See OLC Memo, at 8.

The government's protestations concerning the Fifth Circuit's approach to "has as an element" questions should be met with considerable skepticism, especially because others in the same Department of Justice have apparently found no logical or jurisprudential inconsistencies in that approach. Nevertheless, Mr. Hagen will, out of an abundance of caution, address the government's contention, see Pet. 13, that the Fifth Circuit's "has as an element" analysis is inconsistent with this Court's decision in Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007).

The problem with the government's argument is that Duenas-Alvarez had nothing to do with the "has as an element" analysis. In Duenas-Alvarez, the Court considered whether the California statutory offense of aiding and abetting the taking of a vehicle without consent was the ***enumerated*** offense of "theft" for purposes of 8 U.S.C. § 1101(a)(43)(G). See Duenas-Alvarez, 549 U.S. at 185-94. In the context of an enumerated offense, the Court looks at whether there is "something ***special***" about state law that criminalizes conduct that most other states would not consider to be the generic offense. Duenas-Alvarez, 549 U.S. at 820 (emphasis in original). In other words, there must be a "realistic probability" that the State would apply its law outside the norm. Id. at 193. On the other hand, the "has as an element" analysis, as informed by the "any set of facts" test, is compelled by the plain language of the statute (particularly, its use of the word "element"). See Leocal, 543 U.S. at 7. As the Court recognized in Leocal, if injury can be caused without the use of physical force,

then such force is not an element of the offense. 543 U.S. at 10-11, n.7. This is necessarily a hypothetical analysis based on the language of the statute itself.

3. The Statute Applies to Offenses That Have As An Element the Use of Physical Force, Not to Offenses That Focus on Causing Injury.

The government insists that Congress intended § 921(a)(33)(A)(ii) to describe "generic, common-law battery crimes, including crimes involving the causation of bodily injury by subtle and indirect uses of physical force." Pet. 12. Whatever Congress intended, the statute requires that the predicate offense must "have as an element the use or attempted use of physical force." Congress has demonstrated that it is capable of explicitly defining predicate offenses in terms of injury or risk of injury, rather than the use of force, when it desires to do so. See 18 U.S.C. §§ 924(e)(2)(B)(ii). Similarly, Congress is capable of enumerating the offenses covered by a particular statute. See, e.g., id. (burglary, arson, extortion). Congress did neither here.

The first answer to the government's argument is that "[t]he remedy for any dissatisfaction with the results in particular cases lies with Congress and not with [the courts]. Congress may amend the statute; [the courts] may not." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 576 (1982) (citations omitted). And, indeed, if Congress is dissatisfied with the results produced by this Court's statutory construction of the relevant language, it can easily amend the statute to explicitly adopt the interpretation that

the government espouses.

Additionally, to the extent the government implies that efforts to keep guns out of the hands of domestic abusers will be crippled by this interpretation, the government ignores the fact that 18 U.S.C. § 922(g)(9) is not the end-all and be-all for addressing this problem. States can and do have penal laws and other mechanisms (e.g., restraining orders) capable of addressing this problem. And, indeed, under our federalist system, this is the sort of police power that is more appropriately exercised by the states than by the federal government. As this Court has noted, there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and the vindication of its victims." United States v. Morrison, 529 U.S. 598, 618 (2000) (footnote and citations omitted). Even though § 922(g)(9) may not run afoul of the Constitution, our federalist system counsels against treating § 922(g)(9) as the primary mechanism for addressing a problem better addressed by the states.

One other point must be raised: Mr. Hagen has been living under the shadow of this case for a long time. He was indicted on May 31, 2007, and the charges were dismissed on September 27, 2007. The Fifth Circuit denied the government's second petition for en banc review on March 3, 2010. See Pet. App. E. It is now more than three years since Mr. Hagen was called to answer these charges.

For the reasons previously stated, this Court should not prolong the uncertainty for Mr. Hagen any further. Instead, the

Court should give the circuits the opportunity to address Johnson's clarification of the meaning of "the use of physical force" as applied to § 921(a)(33)(A)(ii)'s definition of crime of violence. The government's petition for writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Date:

July 12, 2010

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

TIMOTHY CROOKS
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana, Suite 1350
Houston, Texas 77002
Telephone: (713) 718-4600